

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of THE TRAFFIC)
GROUP, INCORPORATED) Docket No. MSBCA 1883 & 1888
Under SHA Contract TC-95-001)

June 8, 1995

Bid Protests/Timeliness of Protests

Where information provided with lowest bid would alert a reasonable contractor to grounds for bid protest, and bids (with accompanying information) are made available for inspection immediately following bid opening, time for protest runs from bid opening.

APPEARANCE FOR APPELLANT: Richard W. Moore, Esq.
Baltimore, MD

APPEARANCE FOR RESPONDENT: Edward S. Harris
Scott D. Morrel
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR THIRD PARTY: None

OPINION BY BOARD MEMBER STEEL

Appellant, The Traffic Group, Inc., (TGI) appeals the denial as untimely of its bid protest that the apparently successful low bidder, Borg-Warner Services (Borg Warner), had "no experience" in the field of traffic counting, and should have not been considered a responsible bidder.

Findings of Fact

1. In early 1995, the State Highway Administration (SHA) solicited bids for a contract for the performance of traffic counts in twelve counties. Bids were opened on March 7, 1995. Borg-Warner Services submitted the lowest bid in the amount of \$73,750. Appellant's bid was second lowest at \$81,900.
2. The contract calls for 5000 hours of traffic counting plus analysis of the results. The contract requires direct supervision of personnel with less than 60 hours of experience in conducting traffic studies.

3. The invitation for bids at page 18 contained a section regarding the required experience of personnel as follows:

Personnel with less than 60-hours of experience in conducting traffic studies of the type to which they are assigned must be directly supervised on the job.

Supervisors must have at least 120-hours of counting experience with knowledge of the types of counts that they supervise.

The contractor must have knowledge of all types of counts listed under the Scope of Services. The contractor will be responsible for the accuracy and completeness of all counts. Documentation of Supervisor's experience must accompany the bid. Contractors will also provide three references which can verify the required experience. Misleading inaccurate or unverifiable counting experience will result in disqualification of the bidder.

4. On March 7, 1995, bids were opened by SHA and all bid documents and attachments were available for public inspection.
5. Submitted with the Borg-Warner bid were two letters, one from Borg-Warner to SHA dated March 1, 1995, and the second from Sabra, Halkias & Associates, Inc. (Sabra, Halkias) to Borg-Warner dated March 3, 1995.
6. The March 1, 1995 letter from Mr. Harold M. Taylor of Borg-Warner to the SHA stated in pertinent part:

We have chosen Sabra, Halkias & Associates, Inc. (traffic engineers) of Columbia, Maryland to work with us in providing the initial expertise and experience needed to comply with the stated requirements of this solicitation, although we are not subcontracting any part of this project to them. They will be providing the training, supervision of personnel and summarizing of traffic data for us until our own personnel are capable of assuming these tasks. They will then continuously monitor our progress and consult with us, as needed, throughout the contractual period. As encouraged in your solicitation, we intend to use the advanced technology of traffic data collectors and software supplied by Jamar Technologies, Inc. of Ivyland, PA.

Ziad A. Sabra, Ph.D., P.E., President of Sabra, Halkias & Associates, Inc. has experience in a broad range of civil engineering projects involving traffic engineering, highway design, highway planning and operations, signal design, signal timing, intersection and highway lighting,

marking and signing and the various types of traffic counts as specified in this solicitation. His experience in traffic engineering spans 10 years and includes numerous projects in the state of Maryland alone. If required, specific references can be furnished. We are taking the liberty of enclosing a letter from [sic] Sabra, Halkias & Associates, Inc., confirming their agreement with us, as it pertains to this contract.

7. The March 3, 1995 letter from Mr. Sabra to Mr Taylor and attached to the bid documents included the following language:

*In reference to the subject contracts, **Sabra, Halkias & Associates, Inc.** will be very pleased to provide you with office and on-site training and supervision experience for traffic counting, field surveys and studies, and data reduction. If required, we can also provide you with up to 10 digital counting boards and as many manual counting boards.*

Our key staff is among the best experts in traffic counting, field surveys, and traffic observance studies. We have accumulated over 10 years of experience with the Maryland State Highway Administration, and we are currently supporting them on several traffic studies in many of the counties and districts. Our Principal Traffic Engineer has been involved with over 250 traffic counting studies, full traffic engineering studies and services that have included turning movement counts, license plate surveys, O-D surveys and studies etc. We use the most sophisticated counting equipment, data analysis software, and all of our data reduction methods and forms are approved by the State Highway Administration. Presently we have a three-year contract with District 3 of Maryland State Highway Administration to provide traffic engineering services including traffic counting. We normally train our new employees for traffic counting in the office, and subsequently perform on-site supervision until we are very confident their ability to comprehend and perform their duties. We can provide you with at least four to five traffic counting supervisors at one time.

8. On or about March 16, 1995 an employee of Appellant made a marketing call to Borg-Warner, and in the course of the conversation, was advised that Borg-Warner had never conducted traffic counts and observations.

9. The Special Provisions attached to the IFB concerning subcontracting state in relevant part:

GP-8.01 Subcontracting

Except as may be provided elsewhere in the Contract, the Contractor to whom a Contract is awarded shall perform with his own organization and with the assistance of workmen under his immediate supervision, work of a value of not less than 50 percent of the total original value of the Contract.

No portion of the Contract shall be subcontracted, assigned or otherwise disposed of except with the written consent of the procurement officer. Any assignment, subcontract or other disposition of all or part of this Contract without the express written consent of the procurement officer shall be null and void. Consent to subcontract, assign or otherwise dispose of any portion of the Contract shall not be construed to relieve the Contractor or surety of any responsibility for the fulfilling of all the requirements of the Contract.

The Contractor shall incorporate by reference or otherwise include these General Provisions in every subcontract issued pursuant to or under this Contract, and shall require that the same reference or inclusion be contained in every subcontract entered into by any of its subcontractors.

10. As a result of this information, a bid protest was filed with SHA on March 21, 1995, two weeks after bid opening.
11. COMAR 21.10.02.03B & C require that
- B. . . . Protests shall be filed not later than seven days after the basis for protest is known or should have been known, which ever is earlier.*
- C. . . . A protest received by the procurement officer after the time limits proscribed in [SB] may not be considered.*
12. On April 24, 1995, Charles R. Olsen, SHA's Chief Engineer and Procurement Officer, issued his decision to deny The Traffic Group's protest on the grounds that it was untimely. The Procurement Officer further determined that because of its arrangement with Sabra, Halkias, Borg-Warner was a responsible bidder. This timely appeal to the Board followed.

Decision

The Board finds that the protest to the procurement officer was untimely. A bid protest appeal, where the protest to the agency was not timely filed, must be dismissed by this Board, because COMAR 21.10.02.03 B & C only allow a procurement officer to consider protests which are timely filed. The protest in the instant appeal was filed with the Procurement Officer on March 21, 1995, 14 days after bids were publically opened on March 7, 1995, and the contents thereof immediately made available on that date for public inspection.

The basis for a protest has been found to be known (or constructively known) where a review of bid documents would reveal the alleged deficiencies in a competitive bid. Grady & Grady, Inc., MSBCA 1455, 3 MSBCA ¶217 (1989); Four Seas and Seven Winds Travel, Inc., MSBCA 1372, 2 MSBCA ¶186 (1988). Public inspection of the Borg-Warner bid would have revealed the attachments thereto which would alert the reader to Borg-Warner's lack of experience and its proposal to cure the deficiency.

Appellant did not review the bid. It argues that even if it had read the attachments to the Borg-Warner bid, it would not have understood Borg-Warner's lack of experience until the telephone contact of March 16, 1995. Therefore, it argues, its protest was timely (i.e., the protest was filed within seven days of March 16, 1995.) However, we find that a reading of the portion of the Borg-Warner attachments set out in Findings of Fact nos. 6 and 7 above should have put a reasonable bidder on notice that its competitor internally lacked the resources to provide the supervision and analysis of the data required by the IFB. Therefore, the seven-day period within which the protest was required to be filed commenced on March 7, 1995, and the protest should have been filed on or before March 14, 1995, not March 21, 1995. The seven-day limitation in COMAR 21.10.02.03B is substantive in nature and must be strictly construed. Motorola Communications and Electronics, Inc., MSBCA 1343, 2 MSBCA ¶154 (1987); Frank W. Hake, Inc., MSBCA 1323, 2 MSBCA ¶151 (1987). The Board thus lacks jurisdiction to hear the merits of this appeal.

One further matter requires discussion. Appellant has implied that Borg-Warner is not the actual bidder. However, the record does not reflect in any way that Borg-Warner was a phantom bidder for Sabra, Halkias. Nevertheless in reaching our determination of untimeliness based on our finding that a reading of the attachments to the Borg-Warner bid would have alerted a reasonable bidder to Borg-Warner's lack of experience, we do not mean to convey by such finding any approval or acceptance of bids from bidders who appear to have no experience in the subject of the procurement. In the instant case, however, we do note that the experience required can be developed in the first 120 hours of a 5,000 hour project, and the IFB by its own terms does not preclude a bidder from subcontracting or contractually acquiring the requisite experience from a third party. In fact, the IFB appears to contemplate that essential services would be performed by personnel without even the minimal required experience. See Finding of Fact #3 above. Therefore, if we were to reach the merits, we would likely find that the Procurement Officer's determination that Borg-Warner was a responsible bidder was not an abuse of his discretion in this case. See Solon Automated Services, Inc., MSBCA 1046, 1 MSBCA ¶10 (1982), rev. on other grounds, Solon Automated Services, Inc. v. University of Maryland, et al, Miscellaneous Law Nos. 82-M-38 and 82-M-42 (Cir. Ct. Baltimore Co., October 13, 1982), and Environmental Controls, Inc., MSBCA 1356, 2 MSBCA ¶168 (1987).

Accordingly, the appeal is dismissed.

It is therefore Ordered this 8th day of June 1995 that the appeal is dismissed.

Dated: 6/8/95

Candida Steel
Candida S. Steel
Board Member

Robert B. Harrison III
Robert B. Harrison III
Chairman

Randolph B. Rosenkrantz
Randolph B. Rosenkrantz
Board Member

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1883 & 1888, the consolidated appeals of The Traffic Group, Incorporated under SHA Contract No. TC 95-001.

Dated: 6/8/95

Mary F. Priscilla
Mary F. Priscilla
Recorder

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